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IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

COMMONWEALTH EDISON COMPANY,
THE DETROIT EDISON COMPANY,
EXXON NUCLEAR COMPANY, INC.,
NIAGARA MOHAWK POWER CORPORATION,
OMAHA PUBLIC POWER DISTRICT,
POWER AUTHORITY OF THE STATE OF NEW YORK,
PUBLIC SERVICE COMPANY OF INDIANA, INC., AND
ROCHESTER GAS AND ELECTRIC CORPORATION,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Four years after this Court's unanimous decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), and almost 10 years after this rulemaking began, a decision by the same court of appeals in the same matter may present substantially the same questions:

If the record and statement of basis support the adequacy of agency consideration of "uncertainties" in quantifying generic secondary environmental costs in an APA rulemaking, does NEPA require the agency, nonetheless, to allow further debate of those "uncertainties" in individual licensing cases?

May a court substitute its judgment for that of an agency in the methodology for quantifying environmental costs and/or the assessment of those costs, where both involve predictive technological analyses within the expertise of the agency?

In reviewing the sufficiency of an agency's consideration of environmental costs, is a court limited by the time at which the decision was made?

PARTIES TO THE PROCEEDING

The parties in this proceeding in the court of appeals, in addition to the Petitioners herein were, the Pacific Legal Foundation, the Tennessee Valley Authority, the Natural Resources Defense Council, Inc., the Consolidated National Intervenors, the States of New York and Wisconsin, the Nuclear Regulatory Commission and the United States of America, and the following utilities: Baltimore Gas and Electric Company; Boston Edison Company; Carolina Power & Light Company; Consumers Power Company; Long Island Lighting Company; Northeast Nuclear Energy Company; Northeast Utilities Service Company; Pacific Gas and Electric Company; Pennsylvania Power & Light Company; Philadelphia Electric Company; Public Service Electric and Gas Company; San Diego Gas & Electric Company; Southern California Edison Company; The Connecticut Light and Power Company; The Hartford Electric Light Company; Virginia Electric and Power Company; Western Massachusetts Electric Company; and Yankee Atomic Electric Company (collectively "Baltimore Gas & Electric, *et al.*").

The following Petitioners herein have no parents, affiliates, or non-wholly owned subsidiaries: Commonwealth Edison Company; The Detroit Edison Company; Omaha Public Power District; Power Authority of the State of New York; Public Service Company of Indiana, Inc.; and Rochester Gas and Electric Corporation.

Petitioner Niagara Mohawk Power Corporation has no parent or affiliates but the following subsidiaries are not wholly owned: Moreau Manufacturing Company, Inc. and Beebe Island Corporation.

The parent of Petitioner Exxon Nuclear Company, Inc. is Exxon Corporation, which has hundreds of subsidiaries and affiliates throughout the world. Since the purpose of this listing is to permit the Justices of this Court to ascertain the need for recusal or disqualification, we

list the non-wholly owned subsidiaries and affiliates of Exxon Nuclear Company, Inc. who have related stock or debt securities publicly traded in the United States or Canada: Exxon Enterprises, Inc.; Exxon Pipeline Company; Imperial Oil, Limited; Jersey Nuclear-AVCO Isotopes, Inc.; and Reliance Electric Company.

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IN THE

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OCTOBER TERM, 1982

No. 82—

COMMONWEALTH EDISON COMPANY,
THE DETROIT EDISON COMPANY,
EXXON NUCLEAR COMPANY, INC.,
NIAGARA MOHAWK POWER CORPORATION,
OMAHA PUBLIC POWER DISTRICT,
POWER AUTHORITY OF THE STATE OF NEW YORK,
PUBLIC SERVICE COMPANY OF INDIANA, INC., AND
ROCHESTER GAS AND ELECTRIC CORPORATION,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Commonwealth Edison Company and the other entities listed in the caption above ("Commonwealth Edison, *et al.*") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on all three generations of the rule is yet unreported and is reproduced at Petitioners' Appendix ("Pet. App.") at 1a-181a. The earlier decision of the court of appeals on the first gen-

eration of the rule, *Natural Resources Defense Council, Inc. v. NRC*, is reported at 547 F.2d 633 (D.C. Cir. 1976). The decision of this Court unanimously reversing that earlier decision and remanding it, *sub nom. Vermont Yankee Nuclear Corp. v. Natural Resources Defense Council, Inc.*, is reported at 435 U.S. 519 (1978).

The Statements of Consideration accompanying the different generations of the "Table S-3 Rule" promulgated by the U.S. Nuclear Regulatory Commission and its predecessor, the U.S. Atomic Energy Commission (both "Commission"), are published along with the Table S-3 Rules in the *Federal Register* and appear in Petitioners' Appendix as follows: 39 Fed.Reg. 14,188 (1974), Pet. App. 224a ("Original rule"); 42 Fed.Reg. 13,803 (1977), Pet. App. 240a ("Interim rule"); 43 Fed.Reg. 15,613 (1978), Pet. App. 259a ("Amended Interim rule"); and 44 Fed. Reg. 45,362 (1979), Pet. App. 341a ("Final rule"). The Conclusions and Recommendations of the Nuclear Fuel Cycle Hearing Board regarding the Final rule appear at Pet. App. 274a.

JURISDICTION

The amended judgment of the court of appeals (Pet. App. 182a) was entered on April 27, 1982. Timely petitions for rehearing and rehearing *en banc* were denied by orders entered on June 30, 1982 (Pet. App. 185a and 188a). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1) (1976). *See* 28 U.S.C. § 2350(a) (1976).

STATUTES AND REGULATIONS INVOLVED

The text of sections 4 and 10(e) of the Administrative Procedure Act, 5 U.S.C. §§ 553, 706 (1976 & Supp. IV 1980) ("APA"), sections 1-3, 101-103, 161, 181 and 189 of the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2013, 2131-2133, 2201, 2231, 2239 (1976 & Supp.

IV 1980) ("AEA"), sections 2, 104, 201, 203, 204 and 301 of the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801, 5814, 5841, 5843, 5844, 5871 (1976 & Supp. IV 1980) ("ERA"), and sections 101 and 102 of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4331 and 4332 (1976 & Supp. IV 1980) ("NEPA"), are set forth at Pet. App. 391a-434a.

This case also involves the Original, Interim, amended Interim, and Final Table S-3 Rules which are reproduced at Pet. App. 237a, 254a, 271a, and 378a, respectively, and parts of the Council on Environmental Quality ("CEQ") Guidelines and the subsequent Regulations which are set forth at Pet. App. 435a-441a.

STATEMENT OF THE CASE

This case involves a decision of the United States Court of Appeals vacating three generations of a Commission rule in which the Commission quantifies the secondary generic environmental effects of the Uranium Fuel Cycle [1]

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[1] An understanding of the concept "Uranium Fuel Cycle" is important: In order to render uranium into an acceptable form for use in light water power reactors, one must first mine uranium ore and mill it to separate out the triuranium octoxide (U_3O_8 or yellowcake) which is then converted into a gas (uranium hexafluoride or UF_6) to concentrate the amount of uranium-235 in a process called enrichment. This gas is then reconverted to a solid as uranium dioxide (UO_2), pelletized and inserted in fuel rods, which are then put into assemblies and delivered to the reactor for insertion. All of these activities before use in the reactor are referred to as the "front-end" activities.

After use in the reactor, the fuel ("spent fuel") is expected to be stored on site at the reactor in a water pool for a period of time and thereafter either (a) transported directly to a federal repository for disposal by burial or (b) transported to a reprocessing plant for recovery of the reusable radioactive elements for recycling into the reactor and separation of the waste products which are then reconverted into a solid and encapsulated and transported to the repository after a period of time for burial, as in the case

so that they may be considered in the environmental analysis of the licensing of individual power reactors.[2] All three generations of the rulemaking were conducted pursuant to the informal procedures of section 4 of the APA (Pet. App. 391a) to determine generic technical facts for a limited purpose.

Over eleven years ago intervenors opposing issuance of an operating license to Vermont Yankee Nuclear Power Corporation asserted for the first time that the Environmental Impact Statement ("EIS"), prepared in accordance with NEPA, must consider the radioactive hazards of reprocessing fuel after its use in that power plant ("spent fuel"), as well as the disposition and ultimate storage of the high-level wastes. The intervenors also requested consideration of the transportation of spent fuel from the reactor to the reprocessing plant and of high-level waste from the reprocessing plant to ultimate storage, as well as the environmental costs of decommissioning the reactor on expiration of its licenses.[3]

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of the direct disposal of spent fuel. These two alternative processes are referred to as "back-end" activities of the fuel cycle.

The designation "Uranium Fuel Cycle" used throughout this Petition refers to the fact that, for the purposes of this rule, the Commission posited that the only material which might be recovered for recycling from the spent fuel would be uranium-235; it foresees the plutonium being treated as a waste product. The recovery of plutonium for recycle in a light water reactor or a breeder reactor is outside the scope of these proceedings and is within the scope of other independent proceedings related to the breeder reactor and the use of mixed oxide (uranium and plutonium) fuel in light water reactors.

[2] Petitions for review of each of these three generations of the rule were filed in the U.S. Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. §§ 2341-50 (1976 & Supp. IV 1980).

[3] The Atomic Safety and Licensing Board sustained *Vermont Yankee's* objections to its consideration of these issues, but certified the questions to the Atomic Safety and Licensing Appeal Board. On June 6, 1972, the Appeal Board issued a Memorandum and Order in which it ruled that consideration of transportation of

Shortly, intervenors in other proceedings attempted to introduce similar issues related to the so-called "front-end" fuel cycle activities in individual reactor license proceedings.[4]

On November 15, 1972, the Commission issued notice of an informal rulemaking to consider the applicability of the principle that each EIS for a reactor license application should contain a "full and frank disclosure and consideration of the costs and benefits of the proposed action" to the issue of whether to include a calculation of the environmental costs of the Uranium Fuel Cycle. 37 Fed. Reg. 24,191, 24,192 (1972). As a technical basis for this rulemaking, the Commission published the *Environmental Survey of the Nuclear Fuel Cycle*, WASH 1248, which provided conservative calculations[5] of those

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spent fuel, other high-level waste, and low-level waste from the reactor is within the proper scope of each reactor EIS, as is decommissioning and decontamination of the reactor itself. *In the Matter of Vermont Yankee Nuclear Power Corp., Vermont Yankee Nuclear Power Station*, 4 A.E.C. 930, 931 (ASLAB 1972). However, the Appeals Board also determined that the impacts of reprocessing and waste disposal were beyond the scope of a power reactor EIS. *Id.* at 932. The Appeal Board reasoned that since reprocessing and waste disposal were separate activities and since there was no way of relating particular present or future reprocessing plants or waste disposal sites to a particular reactor, the only point where intelligent consideration (and mitigation) of the environmental costs of those independent activities could take place would be in those fuel cycle activity licensing proceedings, not reactor licensing proceedings. *Id.* at 934-35.

[4] The Appeal Board also excluded consideration of these activities from individual reactor licensing proceedings for the same reasons. E.g., *In the Matter of Long Island Lighting Co., Shoreham Nuclear Power Station*, 6 A.E.C. 53 (ASLAB 1973); *In the Matter of Long Island Lighting Co., Shoreham Nuclear Power Station*, 6 A.E.C. 831 (ASLAB 1973); *In the Matter of Consumers Power Co., Midland Plant, Units 1 and 2*, 5 A.E.C. 261 (ASLAB 1972). *See also Ecology Action v. AEC*, 492 F.2d 998 (2d Cir. 1974).

[5] The Commission's conservatism in these calculations is compounded by its exaggeration of the amount of fuel consumed, underestimating the amount of electricity produced, and then underesti-

costs on a normalized model reactor year basis. The Commission requested comment on two alternatives: (a) whether those costs should be included in the NEPA analysis on the basis of Table resulting from WASH 1248 or (b) whether they could be excluded "since the environmental effects of those activities as related to a particular light water-cooled nuclear power reactor . . . are sufficiently small as not to affect significantly the resultant conclusion," *id.*

After hearings and written comments, the Commission published its decision [6] with a Statement of Consideration on April 22, 1974 (Pet. App. 224a). The Commission decided to include the calculated environmental effects in the Table since that would serve the objective of quantifying "to the fullest extent practicable, the environmental effects of the uranium fuel cycle in individual cost-benefit analysis" (Pet. App. 235a), although it determined that these secondary costs "have been shown to be relatively insignificant" (Pet. App. 234a).

On review of the Original rule (Pet. App. 237a), a panel of the court of appeals unanimously remanded the portions of the rule relating to reprocessing and high-level waste storage to the Commission.[7]

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mating the efficiency of filters and other protective devices (*e.g.*, Pet. App. 282a-293a). The use of the values in the Table for the purposes of a cost-benefit analysis is made even more conservative by the fact that the Commission takes *no* credit for any offsetting benefits of the fuel cycle activities.

[6] The Commission's rulemaking decision had as its basis the 260-page revised Environmental Survey, the written comments of 46 participants and the Regulatory Staff, the 520-page transcript of the oral proceedings, all documents referenced in the foregoing, the Board's report to the Commission, and finally, the 4,000-word Statement of Consideration issued by the Commission with the rule.

[7] *Natural Resources Defense Council, Inc. v. NRC*, 547 F.2d 633 (D.C. Cir. 1976) (*"Vermont Yankee I"*), *rev'd sub nom. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978) (*"Vermont Yankee II"*).

The immediate result of *Vermont Yankee I* was the cessation of reactor licensing by the Commission decision of August 13, 1976. 41 Fed. Reg. 34,707 (1976). On October 18, 1976, the Commission published notice of a proposed Interim rule quantifying the environmental costs of reprocessing and high-level waste management based on an extensive survey of the literature. 41 Fed. Reg. 45,849 (1976). The Commission published the Interim rule on March 14, 1977 (Pet. App. 240a).[8] Thereafter, reactor licensing resumed. After NRDC filed its petition to review the Interim rule, the court of appeals decided to hold that petition in abeyance pending the Supreme Court's disposition of the writ of certiorari to *Vermont Yankee I* (Pet. App. 195a).

On May 26, 1977, the Commission began the third generation of this rulemaking which resulted in the Final rule on July 27, 1979 (Pet. App. 341a). During the course of that third generation of the rulemaking, this Court reversed and remanded the decision of the court of appeals as to the Original rule on April 3, 1978. *Vermont Yankee II*, 435 U.S. 519 (1978). And the court of appeals decided to hold both the remand of the Original rule and the petition for review of the Interim rule in abeyance further, pending the Commission's decision on the Final rule (Pet. App. 200a and 201a).

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[8] The Interim rule was published after a notice-and-written-comment only rulemaking addressing the analysis in the *Environmental Survey of Reprocessing and Waste Management Portions of the LWR Fuel Cycle*, NUREG-0116 (Supp. 1 to WASH 1248) ("NUREG-0116"). This 316-page survey of the literature on the back-end activities of reprocessing and waste management dwarfed the previous survey of the *entire* fuel cycle. Comments from 52 persons, states and other entities were received, reprinted and addressed in a 424-page volume known as NUREG-0216 (Supp. 2 to WASH 1248). Thereafter, the Commission decided to issue an Interim rule in accordance with its Statement of Consideration (Pet. App. 240a). In so doing, it stated that no further discussion of the *costs stated in* the Table would be "required" (Pet. App. 255a).

On April 14, 1978, the Commission amended the Interim rule (Pet. App. 259a) to, among other things, delete radon-222 from the Table and affirm prior decisions of the Appeal Board as to the scope of that Interim rule.[9]

In the third generation of this rulemaking, there were 46 participants including federal agencies, states, public interest groups, utilities and other entities. The proceeding included the record of the previous generations and developed a further examination of the issues. After record was closed,[10] the Hearing Board prepared a 137-page report and later provided the Commission with its Conclusions and Recommendations (Pet. App. 274a-338a). The Commission then received further written comments from the participants (Pet. App. 358a) and heard oral argument on January 19, 1979 (Pet. App. 359a).

On July 27, 1979, the Commission adopted the Final rule (Pet. App. 383a) on the basis of the record and an extensive Statement of Consideration (Pet. App. 341a-378a), including the separate views of two Commissioners (Pet. App. 383a-390a).

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[9] In amending the Interim rule, the Commission considered a petition for rulemaking and found that several issues raised had already been adequately addressed, but that sufficient new information had been developed with respect to the radon-222 to require the elimination of the Table S-3 calculation allowing litigation of this value in licensing proceedings (Pet. App. 263a-264a). The Commission also endorsed the prior decision of the Appeal Board requiring the individual litigation of health effects on the basis of the population doses ("man-rem") stated in the Table (Pet. App. 265a-266a) and discussed its on-going program to gather more data for the Table (Pet. App. 269a-271a). In particular, it also amended note 1 to the Table to make it clear that areas not addressed therein are open to litigation (Pet. App. 272a).

[10] The record in the Final rulemaking consisted not only of the prior record but also of 1,100 pages of direct written testimony followed by two records of written questions producing several hundred pages of answers and then ten days of oral questioning by the Board (1,200 transcript pages) followed by written rebuttal testimony and then concluding statements (Pet. App. 357a-358a).

Separate petitions for review were filed by the State of New York and the NRDC and were consolidated *sua sponte* by the court of appeals (Pet. App. 202a). Subsequently, the court of appeals consolidated all four petitions for review of all three stages of the rulemaking "for all purposes" (Pet. App. 210a). Thereafter, that court requested participation of all parties on all issues relating to all three generations of the rule, regardless of the matter in which a party had petitioned or intervened (*e.g.*, Pet. App. 214a).[11]

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[11] We draw the Court's attention to a possible issue in this matter: Whether Commonwealth Edison, *et al.* have standing as parties in the U.S. Court of Appeals to seek a petition for certiorari with respect to the Original rule. There is no question whether Commonwealth Edision, *et al.* have standing as Intervenor-Respondents in D.C. Cir. Docket Nos. 77-1448, 79-2110 and 79-2131, where intervention was granted on the basis of their full participation in the Interim and Final rulemakings. However, while Commonwealth Edison, *et al.*, were also full participants in the Original rulemaking, they assumed the status of *amici curiae* in the court of appeals in *Vermont Yankee I* and in this Court in *Vermont Yankee II*. After the remand of *Vermont Yankee I* by this Court, the court of appeals consolidated all four matters "for all purposes" (Pet. App. 210a) and thereafter addressed all of its questions on all three generations of the rule to all petitioners, respondents, and intervenors, regardless of the particular docket, inviting argument from all such parties without respect to the generation of the rule in which they had participated or matter in which they had petitioned, responded, or intervened (*e.g.*, Pet. App. 214a).

We recognize that consolidation of two actions does not necessarily make a party to one action a party to the other. *See Johnson v. Manhattan Railway*, 289 U.S. 479, 496-97 (1933). On the other hand, where there is no prejudice to the parties, a consolidation may make a party named in one action but not named in the other, a party to both actions. *See Lloyd v. Industrial Bro-Test Laboratories, Inc.*, 454 F. Supp. 807 (S.D.N.Y. 1978); *cf. Roden v. Empire Printing Co.*, 135 F. Supp. 665 (D.C. Alaska 1955), *aff'd*, 247 F.2d 8 (9th Cir. 1957).

In the special circumstances of this proceeding, we believe that the consolidating order by the court of appeals was intended to, and did, create a single proceeding making Commonwealth Edison,

On April 23, 1979, the court of appeals issued the decision which is the subject of this petition for a writ of certiorari (Pet. App. 1a-181a).[12]

The opinion for the majority of the court by Senior Circuit Judge Bazelon (Pet. App. 1a-69a) holds[13] that all three generations of the rule are invalid because uncertainty is an independent environmental cost (Pet. App. 45a) which must be considered by individual licensing boards regardless of its consideration in reaching the quantification of impacts in the rulemaking (Pet. App. 46a) and the Final rule would prevent such debate. The court of appeals found that this result is dictated by *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1118 (D.C. Cir. 1971) (Pet. App. 46a & n.125). The majority also held that the Original rule and the Interim (prior to amendment) rule were invalid additionally for failure to allow licensing boards to consider cancer deaths, genetic defects; potential social, psychological and economic disruptions related to back-end activities; and the cumulative effects of licensing reactors (Pet. App. 52a-60a, 69a).

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et al. a party to the remand proceeding in No. 74-1586, thus giving Commonwealth Edison, *et al.* standing to petition for a writ of certiorari with respect to the Original rule also (*cf.* Pet. App. 192a, correcting Commonwealth Edison, *et* al.'s designation to be "Intervenor-Respondent" in the proceeding below).

If this Court should decide that Commonwealth Edison, *et al.* do not have standing to petition for a writ of certiorari as to the Original rule, it will not affect either the questions presented or the reasons for granting the writ but only whether this petition reaches the Original rule as well as the Final and Interim rules.

[12] Subsequently, the court issued orders staying the mandate until October 1, 1982 (Pet. App. 190a), and correcting errors in the opinions (Pet. App. 191a and 193a).

[13] A majority of this panel, composed of Judges Bazelon and Wilkey, also held that the Commission's finding of economic feasibility was not arbitrary or capricious (Pet. App. 61a-69a). Judge Edwards dissented from this holding (Pet. App. 115a-116a). The petitioners here do not challenge this holding.

Chief Judge Edwards of the Sixth Circuit joined Senior Circuit Judge Bazelon to form a majority as to these two holdings and filed an extensive opinion (Pet. App. 70a-116a) discussing, in general, this nation's nuclear power program.

Circuit Judge Wilkey dissented from the majority with a detailed rebuttal of the majority analysis citing, *inter alia*, extensively to this Court's decision in *Vermont Yankee II* (Pet. App. 117a-181a).

In relation to the denial of the petitions for reconsideration, Judge Bazelon filed a statement reiterating that *Calvert Cliffs'* requires the individual licensing boards to consider uncertainty (Pet. App. 186a-187a).

The suggestions for rehearing *en banc* were denied with a statement appended: "Judge Wilkey does not ask for *en banc* consideration because he believes nothing should delay consideration of this case by the Supreme Court" (Pet. App. 189a).[14]

REASONS FOR GRANTING THE WRIT

Over the course of a decade, the Commission has conducted an almost continuous examination of the generic costs of the Uranium Fuel Cycle. In a unanimous opinion in *Vermont Yankee II*, this Court directed the court of appeals not to invent new procedures and not to substitute its judgment as to whether the nation should pursue nuclear power, but to limit its review to whether the record and the statement of consideration supported the Commission's findings.

Below we present a detailed analysis of the reasons why this Court should grant a writ of certiorari in this matter. But we think they are best summarized by

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[14] We have also included in the Appendix orders issued by the District of Columbia Circuit in related cases where the Uranium Fuel Cycle rule is an issue (Pet. App. 219a and 221a).

Judge Wilkey in the conclusion to his dissent (Pet. App. 181a):

> This is a rare case indeed. The Supreme Court has already unanimously mandated both the standard and the intensity by which we should scrutinize the very agency action being challenged. Faithful observance of that mandate demands that we now find that the agency's rule was reasonable. The majority has not done so. The decision and the stated rationale on which it is based . . . signal that this court has effectively taken over control of the nuclear industry. This is not the way I read either the substantive law or a judicial commission.

I. THE DECISION WOULD DESTROY AGENCY ABILITY TO RESOLVE GENERIC ISSUES IN RULEMAKINGS AND THEREAFTER EXCLUDE THEM FROM INDIVIDUAL ADJUDICATORY PROCEEDINGS.

This case presents a fundamental issue under the Administrative Procedure Act. The issue is whether an agency must allow further debate of "uncertainties" in individual licensing cases after it has already considered those "uncertainties" in determining a quantification of environmental costs in a rulemaking.[15] In concluding that

> the original, interim and final Table S-3 rules are invalid due to their failure to allow for proper

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[15] Since the court of appeals may have given the Commission a choice between (a) allowing discussion of the uncertainties underlying its rulemaking decisions in each licensing proceeding and (b) using a worst-case analysis for its rulemaking conclusions (*e.g.*, Pet. App. 51a), we address these approaches separately. In our first reason for granting the writ, we address the error of the court of appeals as to the role of uncertainty in licensing proceedings subsequent to its consideration in an APA rulemaking. In our second reason for granting the writ, we address the error of the court of appeals in its concept of "worst-case" analysis and the restraint required of a court in reviewing the quantifications determined by the Commission in its exercise of expertise.

> consideration of the uncertainties that underlie the assumption that solidified high-level and transuranic wastes will not affect the environment once they are sealed in a permanent repository

(Pet. App. 69a), the court of appeals has made a metaphysical leap: It has ruled that uncertainties, at least in the context of NEPA, are independent environmental costs which can never be excluded from debate in an individual reactor licensing system regardless of their previous consideration in a rulemaking (Pet. App. 45a-46a).[16] This would eliminate the value of rulemaking in avoiding delay from the repetitive discussion of generic issues in individual licensing proceedings. This holding is not only contrary to the general decisions of this Court and the court of appeals on the ability of an agency to consider generic issues by rulemaking instead of individual adjudication, but also contrary to the previous opinions of this Court and that court of appeals in this *same* matter. Due to the great delays and inefficient allocation of resources which this holding would wreak throughout the federal decisionmaking

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[16] The majority below identifies two alleged uncertainties: (1) uncertainty as to the integrity of the repository and (2) "uncertainty over whether and when such a repository, or equivalent system of disposal, will be developed" (Pet. App. 45a). The Commission thoroughly considered the first uncertainty as discussed in the text of this petition, but it expressly stated that the second alleged uncertainty is beyond the scope of this rule (Pet. App. 225a, 244a-245a, 344a, 368a-369a). The second alleged uncertainty is currently the subject of a separate rulemaking required by order of this same court of appeals (Pet. App. 45a n.123) and, as Judge Wilkey details, has been the subject of extensive Congressional consideration (Pet. App. 138a n.60). This poses a serious question: Does a judicial requirement for the Commission to form a record, for judicial review, as to whether appropriate waste disposal facilities will exist (and exist at the appropriate time) intrude on the Congressional province in fundamental fashion? *NRDC v. NRC*, 582 F.2d 166 (2d Cir. 1978); *Vermont Yankee II*, 435 U.S. at 558; *but see State of Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979).

process, the judgment of the court of appeals should be reviewed by this Court.[17]

Before we address this serious conflict with prior decisions of this Court and the courts of appeals, this Court must be assured that we have properly characterized the holding at issue.[18] This task is made somewhat difficult by some of the general language used in the opinion for the court as to the agency's ability to use rulemaking (*e.g.*, Pet. App. 43a-44a). However, we agree with Judge Wilkey's dissenting opinion that the only rule which would be acceptable to the court of appeals would be one which allows intervenors, in individual licensing proceedings, to debate continuously the uncertainties which the Commission has already considered in arriving at the quantifications determined in the rulemaking (Pet. App. 161a-163a).

In its Conclusion, the majority of the court of appeals invalidated all three generations of the rule not for a failure to consider uncertainty in those rulemakings, but for "their failure to *allow for proper consideration* of the uncertainties" (Pet. App. 69a; emphasis added). In its analysis, the majority said:

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[17] At stake is not only the survival of rulemaking but the potential for huge cost increases to the nation: Delays in reactor licensing are modestly estimated at $1.27 million per day in the first project years and $1.93 million per day at the operating license stage. The mind boggles at trying to assess the total cost to the nation of the uncertain periods of delay in each reactor licensing which would be attributable to the repetitive "thorough consideration" of *generic* uncertainties. W.W. Brandfon, "Cost Impacts of Nuclear Project Durations," presented before the Atomic Industrial Forum (February 9, 1982) (These costs are based on assumptions of a 12-year schedule (1983-1994), a GNP deflator of 6%, AFDC of 14%, escalation at 12%-8.5%, and direct and indirect costs approximating $1,200/kw).

[18] As this Court said in its prior consideration of this same matter: "But before determining whether the court of appeals reached a permissible result, we must determine exactly what result it reached and in this case that is no mean feat." *Vermont Yankee II*, 435 U.S. at 539. That task may, once again, not be easy.

> As we have emphasized above, NEPA requires an agency to consider the environmental risks of the proposed action in a manner that allows the existence of such risks to influence the agency's decision to take the action. An agency can do this by having the appropriate decisionmakers consider all that is known and unknown about the risks before deciding whether to take an action.

(Pet. App. 51a; footnote omitted).[19] In short, the majority would require a debate in every licensing proceeding not of the Commission's quantifications of costs but of the uncertainties considered in arriving at those quantifications. As Chief Judge Edwards of the Sixth Circuit said in concurring in this holding:

> I agree that it is arbitrary and capricious for the NRC *to close off discussion* of the grave problems involved in building a permanent repository for all nuclear waste by categorical determination in Table S-3 that there will be a zero releases. As I read this record, neither the Commission nor the Commission's staff really defend the zero-release conclusion for any purpose other than *to prevent discussion* of the issue *at licensing hearings.*

(Pet. App. 87a; emphasis added).[20]

We suggest the holding of the court of appeals is illuminated by the following two exchanges between Judge Bazelon and parties to the proceeding:

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[19] By implying that the Atomic Safety and Licensing Board is the "appropriate decisionmaker," the court of appeals also errs. It is the Commission which decides whether to issue a nuclear power reactor license under 42 U.S.C. § 2133 (Pet. App. 398a) and there is no question whether the Commission has considered the uncertainties. Thus, the Commission's consideration of the uncertainty is adequate. 10 C.F.R. §§ 2.770 (general), 2.764(e)(3) (construction permit), 2.764(f)(2) (operating license) (1982); *see Aberdeen & Rockfish Railroad v. SCRAP*, 422 U.S. 289, 321-22 (1975) (*"SCRAP II"*).

[20] Insofar as Judge Edwards reads the Table S-3 rule as deciding the issue of whether a particular waste repository design is safe or whether there will be releases from such a repository, he is mis-

1. In our brief before the court of appeals, we argued that the issue was not whether the Table states uncertainty (much less whether it allows for its further discussion), but whether the Commission had recognized the existence of uncertainty and dealt with it in a rational fashion in reaching the quantification of the costs stated therein. Brief of Commonwealth Edison Co., *et al.* at 12 (July 24, 1980).[21] We further argued that insofar as NEPA requires an EIS to include a discussion of uncertainty, incorporation by reference to the rulemaking was appropriate. Brief of Commonwealth Edison Co., *et al.* at 12 n.4 (July 24, 1980).[22] The opinion for the court

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taken. The sole purpose of this rule is to determine a conservative quantification of the environmental costs of the Uranium Fuel Cycle. The question of confidence in the nation's ability to construct such safe storage is the subject of a separate rulemaking by order of the same court of appeals. Waste Confidence Rulemaking, 44 Fed. Reg. 61,372 (1979), on remand from *State of Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979); *but see NRDC v. NRC*, 582 F.2d 166 (2d Cir. 1978). And waste storage facilities are subject to individual licensing. 42 U.S.C. § 5842 (1976). *Also see* note 16 *supra*. The court of appeals would make the validity of this rule dependent, in part, on the Waste Confidence Rulemaking (Pet. App. 219a and 221a).

Judge Edwards also believes that, if the Table S-3 rule is valid, it "could be taken by the Commission as final approval of its original and present plans for processing spent fuel, fabricating uranium and plutonium into mixed oxide fuel therefrom, and shipping this fuel to nuclear reactors all over the country" (Pet. App. 82a). This is another misconception. The Commission has consistently recognized that the recycle of plutonium in mixed oxide fuel is the subject of a separate proceeding (*e.g.*, Pet. App. 245a, 370a n.28), which proceeding Judge Edwards discusses at length (Pet. App. 81a-103a) although it has no relation to the rule under review.

[21] We said: "Finally, Petitioner NRDC's criticism of the table for 'failing to disclose the substantial uncertainties' is incorrect and misleading. The issue is not whether Table S-3 itself states uncertainties but rather whether the Commission has recognized and addressed in a rational fashion the existence of uncertainties in making its findings." *See* note 22 *infra*, for footnote 4 to that Brief.

[22] At note 4 of that Brief, we said: "Further, insofar as NEPA requires that the EIS contain, or refer to, a discussion of the un-

below directly identified, and explicitly rejected, our argument (Pet. App. 48a n.133 as corrected at Pet. App. 192a).

2. In their Petition for Rehearing and Suggestion for Rehearing *En Banc*, the Commission and the United States argued:

> The record is clear that the Commission took full account of uncertainties. The Commission reasonably found no advantage in having licensing boards repeatedly weigh for themselves the uncertainties inherent in the values contained in the rule. Having carefully considered the uncertainties, the agency was entitled to proceed, and the panel erred by, in effect, substituting its judgment for that of the agency. *North Slope Borough v. Andrus*, 642 F.2d 589, 605 n.93 (D.C. Cir. 1980); *State of Alaska v. Andrus*, 580 F.2d 465, 473-74 (D.C. Cir.), *vacated in part as moot*, 439 U.S. 922 (1978).

Petition for Rehearing and Suggestion for Rehearing *En Banc* by the U.S. Nuclear Regulatory Commission and the United States of America at 11 (June 1982). Senior Circuit Judge Bazelon, in a statement as to why he voted to deny rehearing, replied to the Commission:[23]

> The Commission further argues that, under NEPA, an agency should be able to assess environmental costs in the abstract and subsequently exclude them entirely from consideration when the decision is being made whether to go forward with a project. *Id.* at

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certainties, it is recognized that incorporation by reference is permissible under NEPA. *See Scientists' Institute for Public Information, Inc. v. AEC*, . . ., 481 F.2d 1079, 1082-93 (1973) ("SIPI")." Such incorporation by reference is accomplished explicitly by note 1 to the Table in the Interim rule and thereafter (Pet. App. 257a, 272a, and 382a-383a). *See* CEQ, 12th Annual Report, App. B, Question 25b (1981).

[23] If Judge Bazelon's reading of *Calvert Cliffs'* (that the licensing board must be able to consider uncertainty regardless of a rulemaking decision) is correct, we suggest that *Calvert Cliffs'* should be rejected by this Court explicitly. *Cf.*, SCRAP II, note 18 *supra*, 422 U.S. at 321 n.20.

> 11. We held, and I strongly believe, that this type of consideration violates NEPA, and if permitted, would eviscerate the procedural regiment that NEPA established. As this court stated in *Calvert Cliffs*, NEPA requires that "environmental issues be considered at every important stage in the decisionmaking process concerning a particular action at every stage where an overall balancing of environmental and nonenvironmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs." 449 F.2d at 1118.

(Pet. App. 187a).

Further, an exchange between Judges Wilkey and Bazelon illustrates how Judge Bazelon expects the decision to be applied by the Commission.

In his dissent, Judge Wilkey expressed puzzlement at how Judge Bazelon could uphold the Commission's conclusion of economic feasibility and yet be "unwilling to afford the same deference to the Commission's consideration of the uncertainties relative to its technological predictions . . . [i]f in the economic arena, then a fortiorari in the technological arena, the court must accord to the Commission the deference due in this case." (Pet. App. 170a).

Judge Bazelon answered that the holdings were distinguishable since the NRDC had not challenged the *conclusion* that the zero-release assumption is reasonable, but rather had challenged the Commission's "arbitrary exclusion of the uncertainties surrounding that assumption from any consideration in the licensing process," while New York challenged the Commission's conclusion of economic feasibility but did not raise the issue of further consideration of economic uncertainties (Pet. App. 61a n.174). Judge Bazelon then added: "Economic uncertainties, of course, *still must* be factored into the analysis." *Id.* (emphasis added.) This implies that Judge Bazelon may find sufficient support in the record for the Commission's *conclusions* in Table S-3 as to the environmental costs (as he did for economic feasibility);

in any event, it states that the validity of the determination of economic feasibility in no way prevents further debate [24] concerning the "economic uncertainties" in individual reactor licensing proceedings if an intervenor raises the issue.

On the basis of this analysis and the more extensive analysis in his dissenting opinion, we agree with Judge Wilkey that:

> [I]n a series of small steps, Judge Bazelon has held that uncertainties in the assumptions underlying the figures in the fuel cycle rule can be considered, consistent with NEPA, only as separate environmental costs, [and] has severely qualified and limited the Commission's authority to determine by an otherwise reasonable generic process that certain factors do not merit separate consideration in individual licensing proceedings.

(Pet. App. 162a; footnote omitted).

This holding of the court of appeals conflicts with the prior decision of this Court in *Vermont Yankee II*, as well as other decisions of this Court and the courts of appeals.

It is well settled that it is a valid exercise of administrative discretion for the Commission to determine certain generic facts by a rulemaking without duplicative consideration in subsequent individual proceedings.[25]

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[24] If intervenors accept Judge Bazelon's invitation, the finding of economic feasibility would be meaningless since the uncertainties underlying it would be open to debate in each licensing proceeding. Thus, this *dicta* (in connection with the holding not challenged here) is also incorrect.

[25] *SEC v. Chenery Corp.*, 332 U.S. 194, 203, *rehearing denied*, 332 U.S. 783 (1947); *United States v. Allegheney-Ludlum Steel Corp.*, 406 U.S. 742 (1972); *Morton v. Ruiz*, 415 U.S. 199, 231-33 (1974); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 808-09 n.29 (1978). "[This Circuit's] own acceptance of the general principle that regulatory agencies may on occasion validly dispatch their business by rulemaking rather than by individual adjudication is clear. *Pacific Coast European Conference v.*

Further, in this particular matter, both this Court and the court of appeals have explicitly approved the NRC's decision to proceed by rulemaking rather than individual adjudication in determining the fuel cycle environmental impacts. *Vermont Yankee II*, 435 U.S. at 535 n.13; *Vermont Yankee I*, 547 F.2d at 641 n.17.

This Court also instructed the court of appeals directly that the fact that the quantifications resulting from their rule are to be used in the context of NEPA statements "cannot serve as the basis for a substantial revision of the carefully constructed procedural specifications of the APA." *Vermont Yankee II*, 435 U.S. at 548. After extensive discussion of the well-settled law of informal rulemakings, this Court concluded that the only question remaining for the court of appeals on remand was

> the question of whether the challenged rule finds sufficient justification in the administrative proceedings that it should be upheld by the reviewing court.

Vermont Yankee II, 435 U.S. at 549. In so doing, this Court explicitly endorsed Judge Tamm's analysis in *Vermont Yankee I*, 547 F.2d at 661, and allowed for the court of appeals to take due account of additions to the record made by the Commission in the course of supplementary consideration. *Vermont Yankee II*, 435 U.S. at 535 n.14. The court of appeals stated in *Vermont Yankee III* that it was in fact considering the entire expanded (and now mountainous) record in deciding the validity of all of the rules (Pet. App. 19a & n.39).

The issue now is whether the court of appeals limited its review in accord with the foregoing instructions. It appears that the court of appeals has not accepted that

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Federal Maritime Commission, 376 F.2d 785 (1967)." *Pacific and Southern Co. v. FCC*, 405 F.2d 1371, 1372 (D.C. Cir. 1968); *see also City of Chicago v. FPC*, 458 F.2d 731, 742 (1971), *cert. denied*, 405 U.S. 1074 (1972); *American Airlines, Inc. v. CAB*, 359 F.2d 624, 630 n.10, *cert. denied*, 385 U.S. 843 (1966); *State of Minnesota v. NRC*, 602 F.2d 412, 416-17 (1979); *Ecology Action v. AEC*, 492 F.2d 998, 1002 (2d Cir. 1974).

direction since it finds that "the Table S-3 Rules are arbitrary and *in violation of NEPA* because they fail to allow for consideration of uncertainties underlying the assumption that no radiological effluents will be released into the biosphere once wastes are sealed in a permanent repository" (Pet. App. 34a; emphasis added).[26] *See also, e.g.*, Bazelon, *Science and Uncertainty: A Jurist's View*, 5 Harv. Env. Rev. 209, 211 & n.10 (1981) (citing *Vermont Yankee I* as good law on the court's role in assuring "thorough ventilation," three years after its rejection by this Court in *Vermont Yankee II*).

II. THE DECISION'S CONCEPT OF WORST-CASE ANALYSIS WOULD NULLIFY AGENCY EXERCISE OF EXPERTISE.

In the rule at issue, the Commission undertook the quantification of the generic environmental costs of separately licensed activities for inclusion in the NEPA cost-benefit analysis of individual reactor licenses. On review of the Original rule, the courts of appeals found that the Commission had done "an adequate, even admirable job," with respect to all aspects of the fuel cycle activities except reprocessing and waste disposal.[27]

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[26] This special status for uncertainty as an environmental cost to be debated in each licensing proceeding also contradicts Judge Bazelon's own conception in *Vermont Yankee I*. In *Vermont Yankee I*, then Chief Judge Bazelon stated that for a court to find the "*record* [sufficient] to sustain a rule limiting consideration of the environmental effects of nuclear waste disposal to the numerical values stated in Table S-3," *that record must contain* "a thorough exploration of the problem involved in waste disposal, including past mistakes, *and a forthright assessment of the uncertainties* and differences in expert opinion." 547 F.2d at 653 (emphasis added). This analysis by Judge Bazelon at that time recognized that consideration of uncertainty is a part of the process of quantifying a cost, *not* a separate cost.

[27] The majority, in what may be dicta, also appears to retreat from its former approval of the Commission's quantification of the fuel cycle impacts other than reprocessing and waste management. In stating that "[i]t is impossible for this court to determine

Vermont Yankee I, 547 F.2d at 647. While that decision was under review by this Court, the Commission completed the second generation of this rulemaking to supplement the record on reprocessing and waste management (Pet. App. 240a) and initiated the third generation to further examine the technical bases for its conclusions (Pet. App. 342a).

On review of the combined record of all three generations of that rulemaking, the court of appeals now focuses on one subsidiary part of the Commission's statements of basis, namely, the use of balancing assumptions, on the one hand, that *all* of the fission product gases in *all* spent fuel would be released before the repository is sealed and, on the other hand, that there would be no release of the remaining radioactive materials after repository sealing (Pet. App. 362a-363a). This has come to be mischaracterized by the court of appeals as a "zero-release" assumption, when in fact the Commission has assumed, most conservatively, that the entire inventory of volatile radionuclides is released.[28]

In examining the record, the court of appeals discusses at length on the Commission's recognition of the uncertainty whether the releases from the repository after

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whether there are other numerical values in Table S-3 that mask uncertainties without using such conservative heuristic devices as a worst-case scenario" (Pet. App. 52a), Judge Bazelon may be including an invitation to debate also the uncertainties considered in estimates of the front-end activities. The accompanying footnote 145 includes, but is not limited to, reference to back-end activities (Pet. App. 52a n.145).

[28] Thus Judge Edwards errs when he suggests that the Commission has not taken account of "scientific information strongly suggest[ing]" the release of gaseous radionuclides (Pet. App. 86a). The Commission not only took account of the possibility that *some* fuel elements might release *part* of their inventory of gaseous radionuclides, it assumed the scientifically impossible release of the *total* inventory of gaseous radionuclides by *all* fuel elements (Pet. App. 373a-374a).

sealing would be zero (Pet. App. 34a-46a) as if zero release after repository sealing were the finding of the rule rather than one source of impact from the fuel considered in estimating the fuel's overall impact. On the basis of this barely existent mathematical uncertainty (Pet. App. 302a, 179a-180a), the court of appeals states that the only alternative to its discussion in every licensing proceeding would be a rule which quantified the impacts on the basis of a "worst-case scenario"[29] (Pet. App. 51a), where the court defines the "worst-case" by the Commission's treatment of the volatile radioactive gases, that is, "worst-case" equals the total release of the total radioactive inventory of the fuel without taking account of any barrier or decay.

This ignores the function of the rule to quantify the overall impact of the fuel cycle and would nullify the legislatively delegated and judicially recognized responsibility of the Commission to exercise technical expertise. This alternative of requiring the Commission to abdicate exercise of its technical expertise is an independent basis for this Court to review the judgment of the court of appeals.

The Commission's task in the Interim and Final rulemakings was to assess the scientific data and apply scientific methodology in supplementing the record of the Original rule's quantification of the environmental impact of spent fuel and the storage of waste. As previously described, that impact could occur differently depending on whether the spent fuel is (a) put into permanent storage (disposal) as spent fuel or (b) reprocessed to recover the uranium for recycle with only the plutonium and

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[29] We believe the court of appeals intends the following terms as perfect synonyms for each other: "'worst-case' estimates," "conservative assumptions," "upper bound of reasonably foreseeable costs," "that level of environmental damage," "upper bounds of environmental risks," and "such conservative heuristic devices as a worst-case scenario" (Pet. App. 51a-52a).

waste products put into permanent storage. Since no national decision had been made (nor has it now) as to the alternative to be followed, the Commission assessed both alternatives and combined the most severe impacts of each up until sealing of the repository. Having postulated the release of all radioactive gases prior to sealing, it then examined the mechanisms for the transport of the remaining radionuclides to the biosphere and the probabilities of such transport occurrence after sealing. Finding that migration would be unlikely to occur and, if it did, that the time would be so long as to minimize any impact, the Commission decided that it was safe in concluding that there would be no or slight impact from these remaining nuclides and that, in any event, its excessive conservatism in calculating impacts before sealing more than compensated for any lack of conservatism in this estimate (Pet. App. 363a-370a, 384a; *but see* 388a-390a).

This Court and the courts of appeals have generally recognized that the nature of nuclear technology requires an assessment by the Commission of uncertainties to decide on probabilities of safety. *See, e.g., Power Reactor Development Co. v. International Union of Electrical Workers*, 367 U.S. 396 (1961); *Nader v. NRC*, 513 F.2d 1045 (D.C. Cir. 1975); *Nader v. Ray*, 363 F.Supp. 946, 954 (D.D.C. 1973).

In this case, the record shows that the Commission has used a compound series of conservative assumptions to quantify the costs of the back-end of the fuel cycle as detailed in the Conclusions and Recommendations of the Hearing Board (Pet. App. 280a-293a). Nonetheless, the opinion for the court of appeals appears to find that the only degree of worst-case analysis which is acceptable is where the Commission made assumptions of a degree of impact not scientifically possible (*compare* Pet. App. 51a *with* Pet. App. 289a-293a).

Further, the court of appeals appears to premise its requirement on the CEQ Regulations at 40 C.F.R. § 1502.22 (1981) (Pet. App. 54a & n.149). Not only were these

CEQ Regulations not in effect until after the Commission's decision on the Final rule (July 27, 1979) (Pet. App. 383a),[30] they are not binding on the Commission,[31] and the Commission has not adopted them.[32]

Also, we suggest that the Commission's conservative approach to the quantification of the costs more than fully complies with a reasonable concept of "worst-case" analysis. *See North Slope Borough v. Andrus*, 486 F. Supp. 332, 346-47 (D.D.C.), *aff'd in relevant part*, 642 F.2d 589, 605-06 (D.C. Cir. 1980). The court of appeals concept of a worst-case analysis would deprive the Commission and other federal agencies of the ability to exercise technical judgment and profoundly distort the decisionmaking process. *Also see* CEQ, 12th Annual Report, App. B, Question 18 (1981).

III. THE COURT OF APPEALS WOULD APPLY LATER DEVELOPED STANDARDS OF ADEQUACY TO INVALIDATE THE ORIGINAL AND INTERIM RULES.

In holding the Original and Interim rules invalid "due to their failure to allow for proper considerations of the health, socioeconomic and cumulative effects of fuel-cycle

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[30] The CEQ Regulation became effective July 30, 1979, 43 Fed. Reg. 55,978 (1978); *Vermont Yankee II*, 435 U.S. at 554-555.

[31] Congress did not give the CEQ any authority to issue regulations binding on the Executive Branch or the independent agencies, but only provided for consultation. 42 U.S.C. §§ 4344, 4372(d)(5) (1976). President Carter's Executive Order giving the CEQ the power to make regulations binding on Federal agencies reaches only the Executive Branch, not independent agencies which are "arms of the Congress." E.O. 11,991, 3 C.F.R. 123, 124 (1978); *see* E.O. 12,044, 43 Fed. Reg. 12,661, 12,670 (1978). And the CEQ recognized in its Regulations that they are not binding on Congress (and, therefore, not binding on its creatures such as the Commission). *Compare* 40 C.F.R. § 1500.3 (1981) *with* 40 C.F.R. § 1508.12 (1981).

[32] The Commission states explicitly that it performs its NEPA responsibilities in accordance with that Act and the 1973 Guidelies, not the 1978 Regulations. 10 C.F.R. § 51.1(a) (1982).

activities" (Pet. App. 52a-60a, 69a), the court of appeals has ignored the direction of this Court that the adequacy of the rule must be measured by the time at which it was adopted and the issues raised at that time.[33] *Vermont Yankee II*, 435 U.S. at 554-555.

Insofar as the court of appeals finds that "it is not releases of curies that Congress wanted disclosed" (Pet. App. 58a), it also contradicts its own prior approval of the Original rule's "adequate, even admirable job, of . . . discuss[ing] the risks of accidents and other hazards in detail." *Vermont Yankee I*, 547 F.2d at 647.

Further, to the extent the court of appeals relies on the CEQ Regulations to invalidate the Original and unamended Interim rules (Pet. App. 54a & n.149), it relies on regulations which do not apply to the Commission (*see* notes 30 & 31, *supra*), and which were *not even proposed* until two months after the alleged defect was solved by amendment of the Interim rule, as well as 15 months after the Interim rule was adopted, and four years after the Original rule became effective. *Compare* 43 Fed. Reg. 25,230 (June 9, 1978) *with* Pet. App. 259a, 258a, and 237a, respectively.

If this holding of the court of appeals is read to rely on the alleged preclusive effect of the Original and Interim rules,[34] it fails to distinguish among the concepts of to "allow," "require" and "preclude." The court of appeals, recognizing that the Appeal Board's *Hartsville*

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[33] A further, and especially egregious, example of such metachronistic judgments is the majority's criticism of the 1974 and 1977 rules for a failure to address "psychological disruption" (Pet. App. 53a), a factor rejected by other courts of appeals and *only* recognized by this Circuit *16 months after* the argument of *Vermont Yankee III*. *See People Against Nuclear Energy v. NRC*, 678 F.2d 222 (D.C. Cir. 1982).

[34] The majority's juxtaposition of quotes from separate parts of the record may be somewhat misleading (*compare* text at Pet. App. 57a nn.161 & 162 *with* Pet. App. 348a and 350a). The Commission does not state that either the licensing boards or its staff considered further discussion was cut off, but only that the staff considered further discussion was not required.

decision required the consideration of comparative health effects, finds the Interim rule invalid although the *Hartsville* decision preceded the issuance of the Interim rule. *Compare In the Matter of Tennessee Valley Authority, Hartsville Nuclear Power Plant, Units 1A, 2A, 1B and 2B*, 5 N.R.C. 92 (ASLAB January 25, 1977) *with* Pet. App. 240a (March 14, 1977). Further, the court of appeals does not discuss the responsibility of intervenors to raise issues clearly as identified by this Court in *Vermont Yankee II*, 435 U.S. at 553. Those opposing the grant of nuclear reactor licenses have not generally been hesitant to raise issues even when they have already been addressed by the Commission (*e.g.*, Pet. App. 260a-265a).

If the court of appeals is allowed to invalidate rules on the basis of standards which not only do not apply to, but also did not even exist at the time of, the Commission's decisions on those rules, this Court's ruling in *Vermont Yankee II* becomes meaningless. 435 U.S. at 554-555. Further, this holding should be reviewed by this Court since it would impose a great burden on the Commission by requiring a re-evaluation of all of the reactor licenses previously issued under, and previously re-evaluated in light of, the Interim rule.

Section III.A of *Vermont Yankee II* addressed the adequacy of the Commission's treatment of the energy conservation issue under NEPA. 435 U.S. at 549-55. Therein this Court held that "the concept of 'alternatives' is an evolving one." 435 U.S. at 552. This Court instructed: "The role of a court in reviewing the sufficiency of an agency's consideration of environmental factors is a limited one, limited both by *the time in which the decision was made* and by the statute mandating review." 435 U.S. at 554 (emphasis added). Likewise, other aspects of the adequacy of the scope and depth of any agency consideration (whether or not under NEPA) evolve and a court, on review, must judge the adequacy of the record to support the content of the rule in the context of the time of the agency's decision, not by later developed judicial standards.

CONCLUSION

The petition for certiorari should be granted. Further, since the court of appeals is so clearly wrong for the reasons extensively stated in Judge Wilkey's dissent, summary reversal on the basis of that dissent and this Court's decision in *Vermont Yankee II* is warranted. *See Stryker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980); *Northern Indiana Public Service Co. v. Porter County Chapter of the Izaak Walton League*, 423 U.S. 12 (1975). If the Court considers summary reversal to be inappropriate, the case should be set for briefing and argument on the merits.

Respectfully submitted,

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